

NO. 18890 ✓

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CECILIA E. SOULE, Executrix of the )  
 )  
 Estate of WALTER N. SOULE, Deceased, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 KAHULUI RAILROAD COMPANY, )  
 )  
 Appellee. )

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLANT

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CROCKETT and LANGA  
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 Wailuku, Maui, Hawaii

Proctors for Appellant  
 Cecilia E. Soule, Executrix of the  
 Estate of Walter N. Soule, Deceased.

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THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF CHEMISTRY  
5800 S. UNIVERSITY AVENUE  
CHICAGO, ILLINOIS 60637  
TEL: (773) 835-3100  
WWW: WWW.CHEM.UCHICAGO.EDU

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TO THE PRESIDENT

FROM THE DEPARTMENT OF ECONOMICS

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DATE: [Illegible]

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CECILIA E. SOULE, Executrix of the )  
Estate of WALTER N. SOULE, Deceased, )  
Appellant, )  
vs. )  
KAHULUI RAILROAD COMPANY, )  
Appellee. )

---

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an interlocutory appeal from an order entered on June 28, 1963, by the United States District Court for the District of Hawaii, in a limitation of liability proceeding in admiralty (46 USC Section 185), which prohibited the joinder of the Kahului Railroad Company, Appellee, as a third party defendant in an action in the Second Circuit Court of the State of Hawaii brought against Soule, Executrix, Appellant. Notice of Appeal was filed on July 12, 1963.

The jurisdiction of this Court to review the order of the District Court rests upon 28 USC Section 1292(a). The jurisdiction of this Court has been determined. Appellee filed a Motion To Dismiss Appeal. After a hearing, the motion was denied.

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DEPARTMENT OF CHEMISTRY

RESEARCH REPORT NO. 10

BY J. H. HARRIS

1917

CHICAGO, ILL.

1917

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#### INTRODUCTION

The following report describes the results of a series of experiments conducted during the summer of 1917, in the laboratory of the Department of Chemistry, University of Chicago. The experiments were carried out under the supervision of Professor J. H. HARRIS, and were designed to determine the effect of temperature on the rate of reaction between hydrogen peroxide and potassium permanganate in the presence of various catalysts. The results show that the rate of reaction increases with increasing temperature, and that the effect of temperature is more pronounced in the presence of certain catalysts than in others. The experiments were conducted in a series of glass vessels, and the rate of reaction was determined by measuring the volume of oxygen gas evolved over a given period of time. The results are summarized in the following table:

Temperature (°C)	Rate of Reaction (ml. O <sub>2</sub> /min.)	Catalyst
10	0.5	Potassium permanganate
20	1.0	Potassium permanganate
30	1.5	Potassium permanganate
40	2.0	Potassium permanganate
50	2.5	Potassium permanganate
60	3.0	Potassium permanganate
70	3.5	Potassium permanganate
80	4.0	Potassium permanganate
90	4.5	Potassium permanganate
100	5.0	Potassium permanganate
10	1.0	Potassium dichromate
20	2.0	Potassium dichromate
30	3.0	Potassium dichromate
40	4.0	Potassium dichromate
50	5.0	Potassium dichromate
60	6.0	Potassium dichromate
70	7.0	Potassium dichromate
80	8.0	Potassium dichromate
90	9.0	Potassium dichromate
100	10.0	Potassium dichromate

The results of these experiments show that the rate of reaction between hydrogen peroxide and potassium permanganate increases with increasing temperature, and that the effect of temperature is more pronounced in the presence of potassium dichromate than in the presence of potassium permanganate. This is due to the fact that potassium dichromate is a more powerful catalyst than potassium permanganate, and its effect is more pronounced at higher temperatures. The results also show that the rate of reaction is independent of the concentration of the reactants, which is in agreement with the theory of reaction rates.

The jurisdiction of the District Court, if it was empowered to enter the order from which the appeal has been taken, was based on 46 USC Sections 183 and 185, Rule 51 of the Rules of Practice In Admiralty and Maritime Cases, and the facts alleged in the petition of Kahului Railroad Company For Exoneration From or Limitation of Liability. (Rec. pp. 1-12).

#### STATEMENT OF THE CASE

On May 16, 1962, the tug William Walsh collided with the vessel Hawaiian Educator at the entrance to Kahului Harbor, County of Maui, State of Hawaii. As a result, the William Walsh sank and two of her crew, Walter N. Soule and Nobuyoshi Toyofuku, captain and deck hand, respectively, were killed. Soule and Toyofuku were employed by Kahului Railroad Company.

Kahului Railroad Company, Appellee, owned and operated the tug Walsh. Matson Navigation Company owned and operated the vessel Hawaiian Educator. The casualty occurred within the territorial waters of the State of Hawaii, that is, within one marine league of shore. (46 USC Section 761, "The Death On The High Seas Act").

Toyofuku and Soule were residents of the County of Maui of the State of Hawaii. Kahului Railroad Company is a Hawaii corporation. Kahului Railroad Company operates trucking, stevedoring and harbor facilities at Kahului Harbor on the island of Maui.

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Appellant Cecilia E. Soule, Executrix of the Estate of Walter N. Soule, decedent's widow, filed an action in the United States District Court for the District of Hawaii (Civil No. 2103) against the Kahului Railroad Company, her husband's employer, under the "Jones Act" (46 USC Section 688), for the death of her husband. Cecilia E. Soule is a resident of the County of Maui of the State of Hawaii.

Florence Toyofuku, Administratrix of the Estate of Nobuyoshi Toyofuku, and other Toyofuku heirs, filed an action in the Second Circuit Court of the State of Hawaii (Civil No. 406) against Cecilia E. Soule, Executrix, Gordon Wilkinson (an alternate master who was in control of the tug Walsh prior to the collision) and Matson Navigation Company, for the allegedly wrongful death of Nobuyoshi Toyofuku. (Plaintiffs Toyofuku added Matson Navigation Company as a defendant after the entry of the order from which this appeal has been taken.) The Toyofuku action has been brought under the State of Hawaii wrongful death and survival statutes, and under the common law rule, peculiar to Hawaii, which provides a remedy for wrongful death. (Kake v. Horton, 2 H 209 (1860). Sections 246-2 and 246-6, R.L.H., 1955.) The Toyofuku claimants pray for judgment "against defendants or any of them as may be liable in the sum of \$350,000." The Toyofuku claimants are residents of the County of Maui of the State of Hawaii

On November 9, 1962, Kahului Railroad Company filed a petition on the admiralty side of the United States Court for the District of Hawaii (Admiralty No. 495) for an order limiting

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its liability in respect of the Walsh casualty, under 46 USC Section 185, and obtained an admiralty order enjoining the "filing or prosecution of any suits, actions or libels or proceedings in any Court whatsoever" against it in respect of any claims arising out of the Walsh casualty, except in the limitation proceeding. (Rec. pp. 1-16). Kahului Railroad Company deposited, for the benefit of the Soule and Toyofuku heirs, and any other claimants, the sum of \$318 as the limitation fund. (Rec. pp. 15-16).

On December 15, 1962, Soule, Executrix, moved the Court of Admiralty to vacate the injunction prohibiting proceedings in other courts, so that she could proceed with the trial of her "Jones Act" action in the United States District Court for the death of Walter N. Soule. The motion was denied.

On March 15, 1963, Soule, Executrix, moved the Court of Admiralty to determine whether "she can exercise her right under the laws of the State of Hawaii, to defend herself in said action in the Second Circuit Court of the State of Hawaii [the Toyofuku action], by joining petitioner Kahului Railroad Company to such action as a third party defendant pursuant to Rule 14(a) of the Hawaii Rules of Civil Procedure. (Rec. pp. 51-53). Rule 14(a) of the Hawaii Rules of Civil Procedure provides:

"Before the service of his answer  
a defendant may move ex parte or,  
after the service of his answer,

PH.D. THESIS

BY

DR. [Name]

DEPARTMENT OF [Department]

CHICAGO, ILLINOIS

19[Year]

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on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant.

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A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant."

Section 246-16, R.L.H., 1955, provides:

"Third party practice, amended complaints, counterclaims and cross-complaints, and motion practice. Before answering, a defendant seeking contribution in a tort action may move ex parte or, after answering, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable as a joint tort-feasor to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served hereinafter called the

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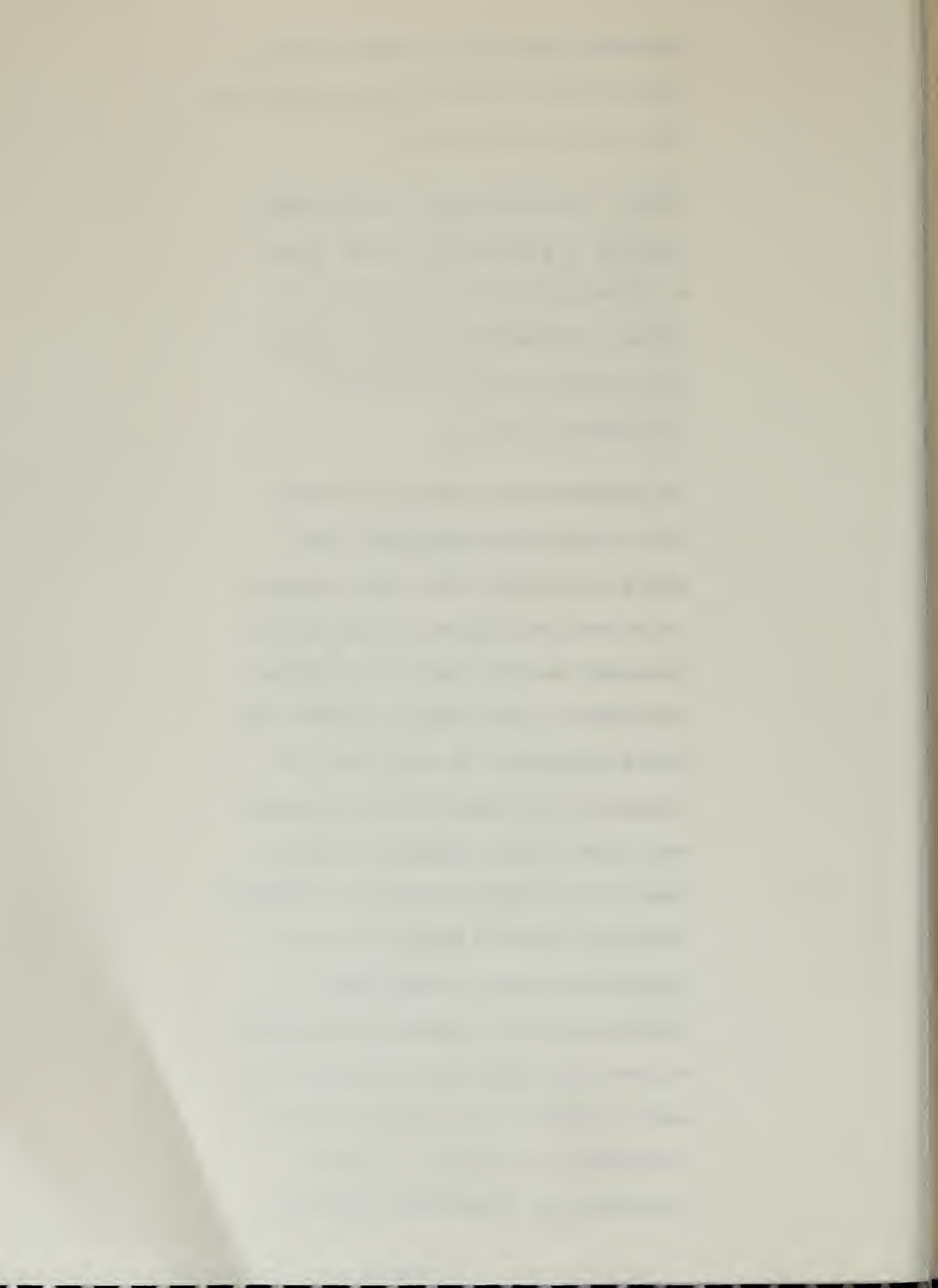
third-party defendant, shall make his defense to the complaint of the plaintiff and to the third-party complaint in the same manner as defenses are made by an original defendant to an original complaint. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The plaintiff shall amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff as well as of his own liability to the plaintiff and to the third-party plaintiff. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable as a joint tortfeasor to him or to the third-party

The first part of the book is devoted to a general  
introduction to the subject of the history of  
the world, and to a description of the various  
civilizations which have flourished on the  
earth. The author then proceeds to a detailed  
account of the history of the world, from the  
beginning of time to the present day. The  
book is written in a clear and concise style,  
and is well illustrated with maps and  
pictures. It is a valuable work for all  
those who are interested in the history of  
the world.

plaintiff for all or part of the claim made in the action against the third-party defendant.

"When a counterclaim is asserted against a plaintiff he may cause a third-party to be brought in under circumstances which under this section would entitle a defendant to do so.

"A pleader may either (a) state as a cross-claim against a co-party any claim that the co-party is or may be liable to the cross-claimant for all part of a claim asserted in the action against the cross-claimant; or (b) move for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tortfeasors one of whom has discharged the judgment by payment or has paid more than his pro rata share thereof. If relief can be obtained as provided in this paragraph no independent action



shall be maintained to enforce  
the claim for contribution.

"The court may render such judgments,  
one or more in number, as may be  
suitable under the provisions of  
this part.

"As among joint tortfeasors against  
whom a judgment has been entered  
in a single action, the provisions  
of the last paragraph of section  
246-11 apply only if the issue  
of proportionate fault is litigated  
between them by cross-complaint in  
that action."

The District Judge held: (1) The admiralty injunction issued  
in the limitation proceeding prohibited joinder of Kahului  
Railroad Company as a third party defendant in the Toyofuku  
action in the state court, and (2) The injunction would not  
be modified to permit such joinder. This is the order of the  
District Court from which this appeal has been taken. (Rec.  
pp. 54-58).

SPECIFICATION OF ERROR RELIED UPON

The District Court erred in refusing to modify the  
injunction, issued in the admiralty limitation proceeding, which



enjoined the filing or prosecution in any Court whatsoever, except in the limitation proceeding, against either the petitioner [Kahului Railroad Company] or the tug William Walsh in respect of any claims arising out of the Walsh casualty, to permit the joinder of Kahului Railroad Company as a third party defendant, pursuant to the laws of the State of Hawaii, in the action in the Second Circuit Court of the State of Hawaii brought by the Toyofuku claimants against Soule, Executrix, and others, under the State of Hawaii wrongful death and survival statutes and Hawaii common law.

QUESTION PRESENTED

Whether the "Saving To Suitors" clause of 28 USC Section 1333 saves to a defendant his state-created right to join the owner of a vessel as a third party defendant in a wrongful death action pending in a state court, even though the shipowner has petitioner admiralty for an order limiting its liability?

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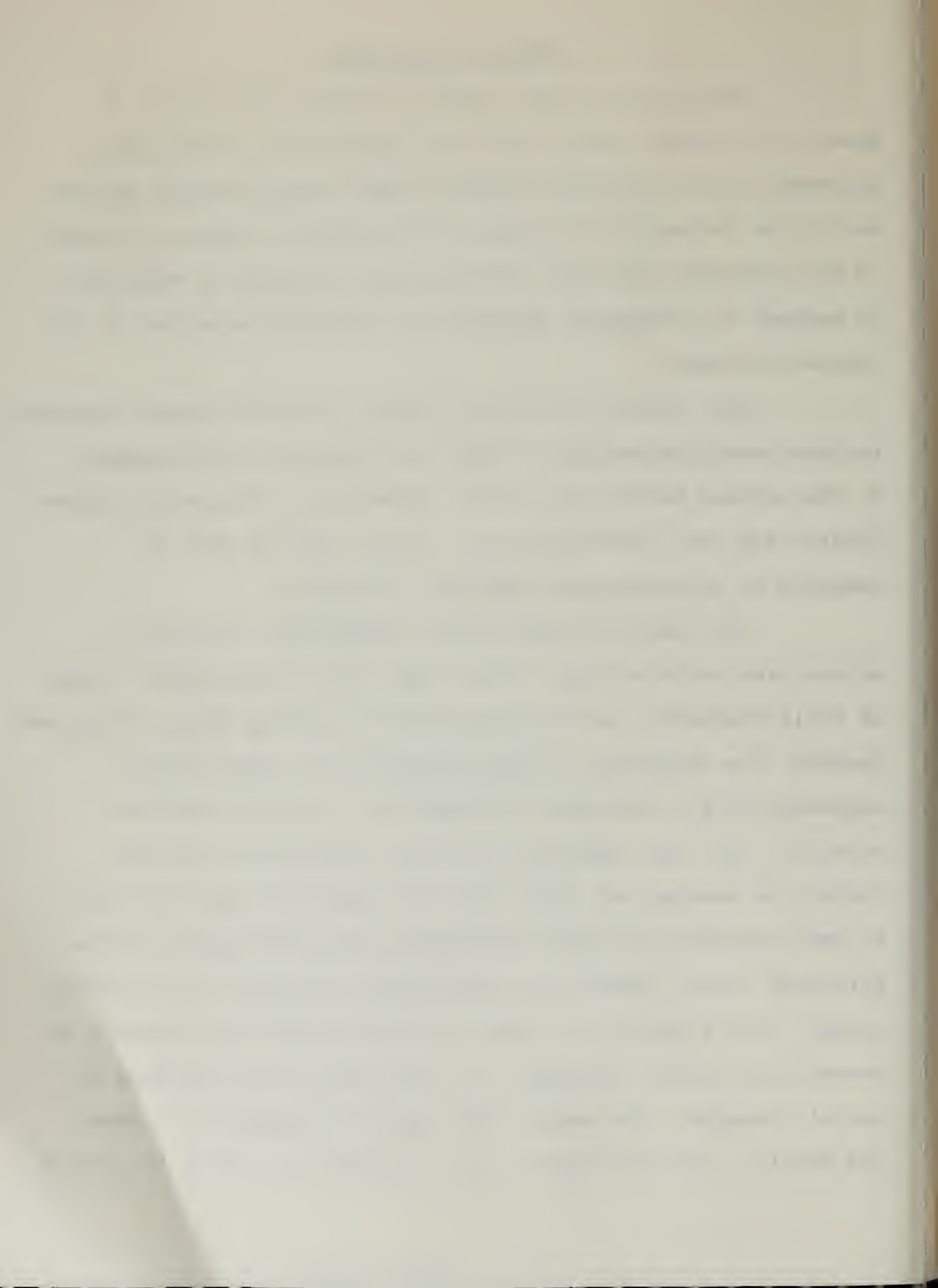


## SUMMARY OF ARGUMENT

Soule has a right, under the laws of the State of Hawaii, to implead Kahului Railroad Company as a third party defendant to the Toyofuku wrongful death action brought against her in the Second Circuit Court of the State of Hawaii. Joinder of the shipowner will not infringe upon the power of admiralty to protect the shipowner against any liability in excess of the limitation fund.

The "Saving To Suitors Clause" preserves state authority in local maritime matters. There is a conflict, with respect to the problem before this Court, between the "Saving To Suitors Clause" and the "Limitation Act". This conflict must be resolved by balancing the competing interests.

The State of Hawaii has a substantial interest in maintaining Soule's right, under Rule 14(a) of the Hawaii Rules of Civil Procedure, to defend herself by joining Kahului Railroad Company, the shipowner, to the action in the state courts. Impleader of the shipowner is important to Soule's defense because: (1) The liability of Soule and Kahului Railroad Company is several, not joint; and (2) Soule may lose her right to seek contribution from the Kahului Railroad Company if the shipowner is not joined as a third party defendant in the state action. The liability of Soule and Kahului Railroad Company is several, not joint, because: (1) The duties owed Toyofuku by Soule's decedent, the master (the duty to navigate with care), and Kahului Railroad Company, the shipowner (the duty to provide

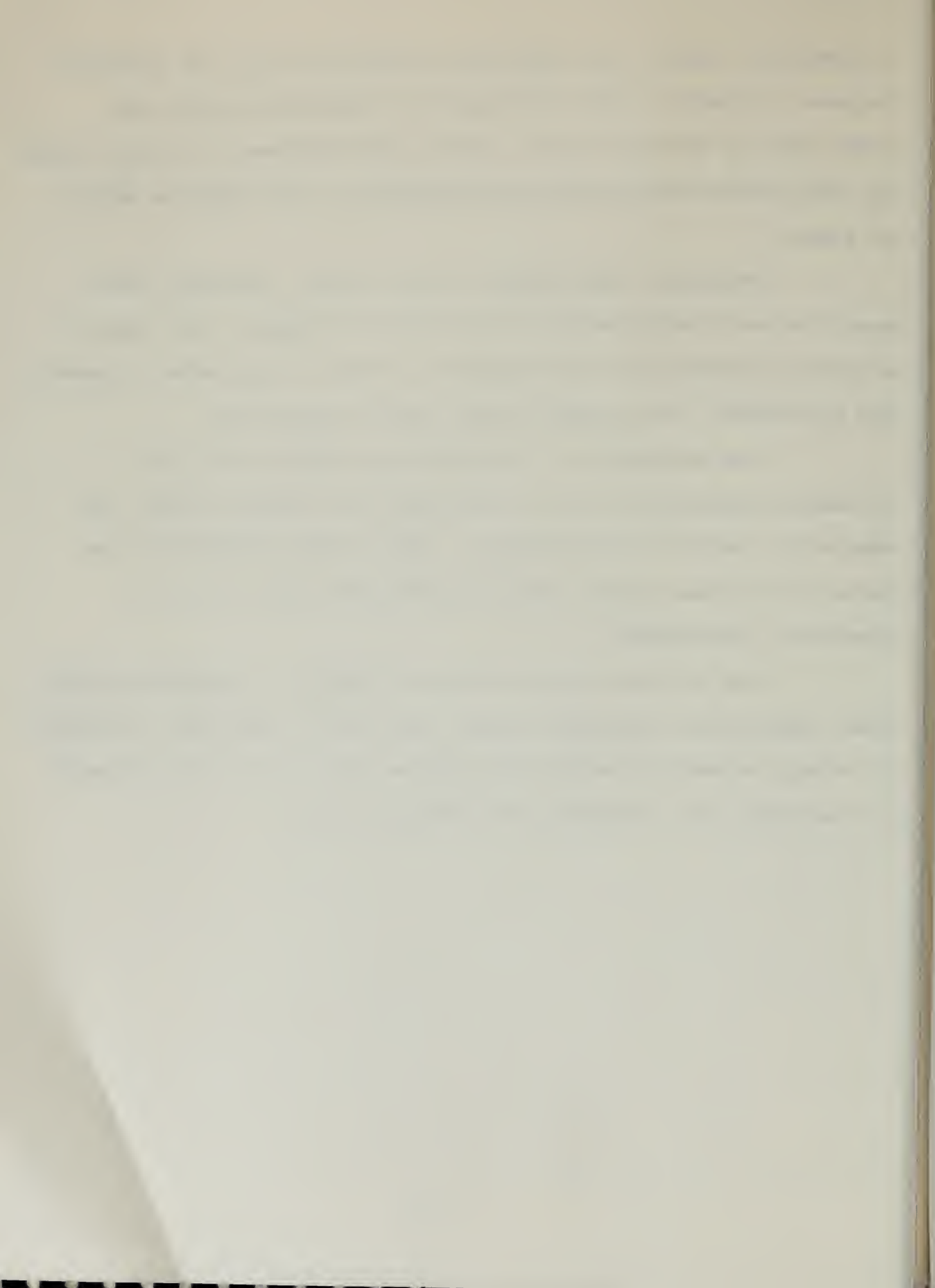


a seaworthy vessel) are different in kind; and (2) The relative degrees of fault of the tortfeasors is disproportionate and, under Section 246-11, R.L.H., 1955, each tortfeasor is only liable for the portion of the loss attributable to his relative degree of fault.

Moreover, the subject of the action, wrongful death upon the territorial waters of the State of Hawaii, is a matter entirely regulated by the substantive laws of the State of Hawaii. The procedural law of Hawaii must govern the action.

The shipowner is interested in limiting all the litigation arising out of the casualty to a single forum, the admiralty limitation proceeding. This is not possible to the extent that Soule cannot force the Toyofuku claim into the limitation proceeding.

The interest of the State of Hawaii in affording Soule every opportunity available under the laws of the State of Hawaii to defend herself outweighs the narrow interest of the shipowner in confining the litigation to a single forum.



## ARGUMENT

### I.

"THE SAVING TO SUITORS CLAUSE" AND  
THE "LIMITATION ACT" ARE IN CONFLICT,  
AND THE CONFLICT MUST BE RESOLVED BY  
BALANCING THE COMPETING INTERESTS.

Kahului Railroad Company, Appellee, owner of the tug Walsh, petitioned admiralty for an order limiting its liability in respect of the claims arising out of the Walsh casualty. The limitation petition was based on the limitation statute. 46 USC Section 185. Admiralty issued an order prohibiting the prosecution of any suits against petitioner in any court except admiralty. The injunction issued pursuant to Rule 51 of the Rule of Practice In Admiralty And Maritime Cases.

Toyofuku and Soule, of the Walsh crew, were killed in the accident. Toyofuku's Administratrix and heirs have sued Soule's Executrix for Toyofuku's death in the courts of the State of Hawaii under the State of Hawaii wrongful death and survival statutes. Sections 246-2 and 246-6, R.L.H., 1955. (The Toyofuku action is also based on the common law rule, peculiar to Hawaii, which permits an action for wrongful death in the absence of a statute. See, The Schooner Robert Lewers Co. v. Kekauoha, 114 F 849 (9th Cir. 1902).)

Rule 14 (a) of the Hawaii Rules of Civil Procedure and Section 246-16, R.L.H., 1955, permit the joinder of "a

Received of the Treasurer of the  
Board of Education the sum of  
Twenty Dollars for the year  
ending 1875

Witness my hand and seal this  
15th day of June 1875  
Attest  
The Treasurer of the Board of Education

Received of the Treasurer of the  
Board of Education the sum of  
Twenty Dollars for the year  
ending 1875

person, not a party to the action, who is or may be liable... to the plaintiff for all or a part of the plaintiff's claim against him [principal defendant]". The District Court ruled that Soule's Executrix cannot join Kahului Railroad Company as a third party defendant to the Toyofuku death action in the state courts. Soule's Executrix cannot exercise her state-created rights, under Rule 14(a) of the Hawaii Rules of Civil Procedure, and Section 246-16 R.L.H., 1955, because Kahului Railroad Company, the shipowner, seeks to limit its liability for the Walsh casualty.

The principle of limited liability is not at stake. Cf. Maryland Casualty Co. v. Cushing, 347 U.S. 409,427 (1954), op. by Black, J. Soule does not question the shipowner's right to petition for limitation. And if the shipowner is entitled to limitation, Soule agrees that, even though the state court may enter judgment against Kahului Railroad Company as a third party defendant, the limitation statute will protect the shipowner against any liability in an amount in excess of the limitation fund. Langnes v. Green, 282 U.S. 531 (1931). The authority of the court of admiralty over the limitation proceeding, and admiralty's power to limit the shipowner's liability, is not in any way diminished because the shipowner is joined as a third party defendant in the state action. If the proceedings in the state court should result in the entry of a judgment against the shipowner, as a third party defendant, admiralty has the power to enjoin execution of the judgment pending a final





decision in the limitation proceeding. Ex Parte Green, 286 U.S. 437 (1932).

What is at stake is the right of a citizen of a state to exercise certain state-created procedural rights in an action, pending in a state court, between citizens of the state, that relates to a subject governed by the substantive law of the state, i.e. an action for wrongful death within the territorial waters of the state.

28 USC Section 1333 provides in part:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

This statute preserves state authority in maritime matters of local concern. Lake Tankers Corp. v. Henn, 354 U.S. 147 (1957). See, Stolz "Pleasure Boating and Admiralty: Erie At Sea", 51 Calif. L. Rev. 661 (1963). 46 USC Section 185 provides in part:

"Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

The statutes are in conflict.

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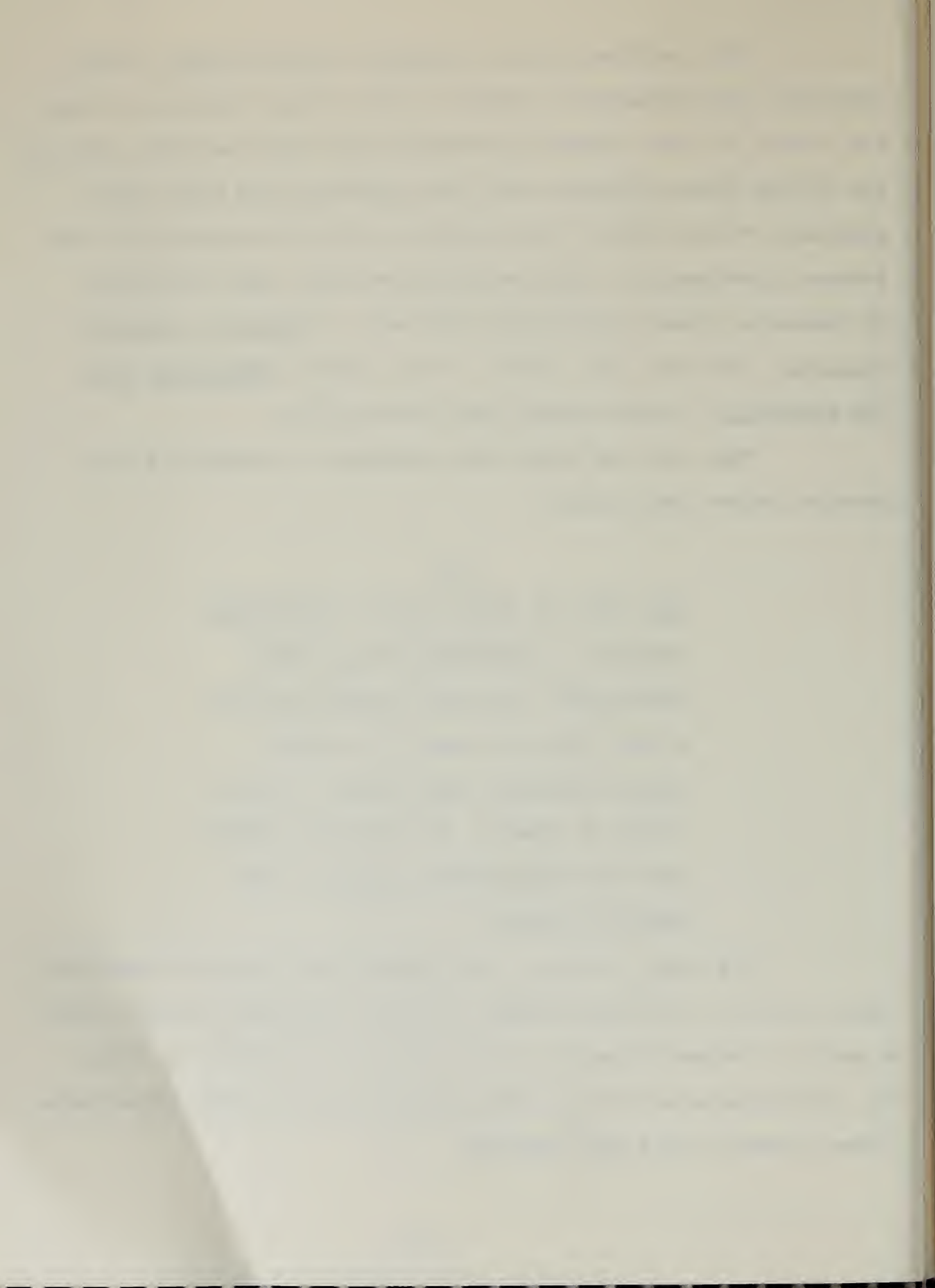
This surface conflict presents another aspect of the recurring and fundamental problem of the proper relation between the states and the federal government over local maritime matters. The United States Supreme Court has recently said that these problems, which reflect the interest of both the states and the federal government in local maritime matters, must be solved by balancing these conflicting interests. Kossick v. United Fruit Co., 365 U.S. 731 (1961). See, Currie "Federalism And The Admiralty", 1960 Supreme Court Review 158.

What are the competing interests in respect of the problem before this Court?

## II.

THE STATE OF HAWAII HAS A SUBSTANTIAL INTEREST IN AFFORDING SOULE EVERY OPPORTUNITY AVAILABLE UNDER THE LAWS OF THE STATE OF HAWAII TO DEFEND HERSELF AGAINST THIS ACTION, IN THE COURTS OF HAWAII, FOR WRONGFUL DEATH UPON THE TERRITORIAL WATERS OF THE STATE OF HAWAII.

The State of Hawaii has established rules of procedure (Rule 14(a) of the Hawaii Rules of Civil Procedure) which permit a party to defend himself in the courts of the State of Hawaii by joining persons who are not parties as third party defendants. These liberal rules are remedial.

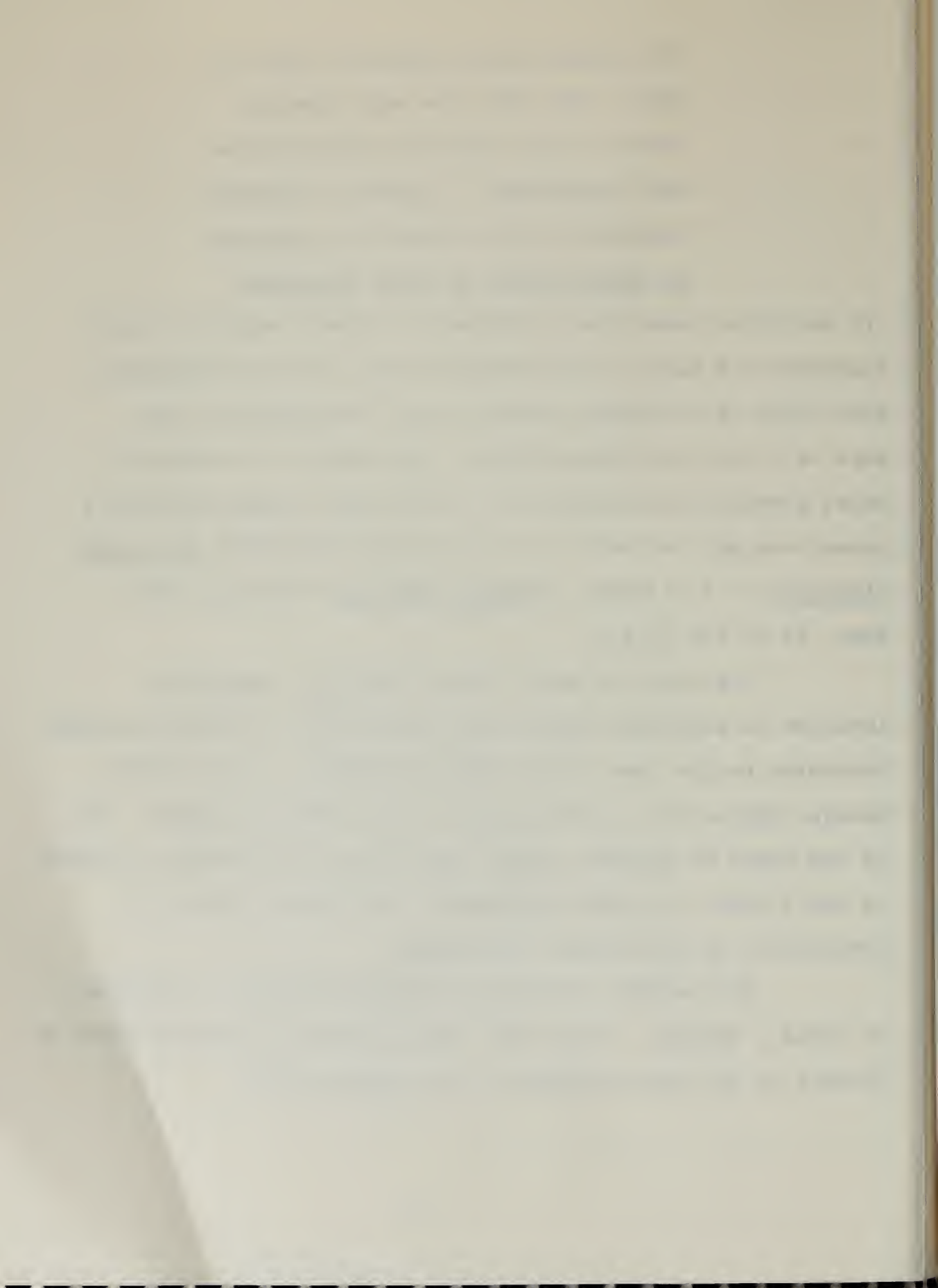


"The Rules become effective June 14, 1954. They make the most sweeping reform in our practice and procedure ever undertaken." Anthony, Chairman, Procedural Rules Committee, Foreword To Hawaii Rules of Civil Procedure.

(It should be noted that, although the Hawaii Rules of Civil Procedure are based on the Federal Rules of Civil Procedure, Rule 14(a) of the Hawaii Rules is more comprehensive than Rule 14(a) of the Federal Rules. Rule 14(a) of the Hawaii Rules permits the issuance of a third party summons against a person who may be liable to the principal defendant or to the plaintiff. Cf. 3 Moore, "Federal Practice" (2d.ed. 1963), Secs. 14.10 and 14.11.)

The State of Hawaii has a definite, legitimate interest in affording Soule every opportunity to defend herself, according to the laws of the State of Hawaii, in the action brought against her in the courts of the State of Hawaii. One of her means of defense, under these laws of the State of Hawaii, is the joinder of other tortfeasors, who may be liable to plaintiffs, as third party defendants.

The joinder of Kahului Railroad Company is important to Soule's defense. There are three reasons why such joinder is crucial to the Soule defense in the state courts.



First Soule's liability to the Toyofuku claimants rests on her decedent's alleged failure to properly navigate the tow boat. (Soule was the master.) The liability of Kahului Railroad Company is based on the vessel's unseaworthiness. The duties each owed Toyofuku were entirely dissimilar. The shipowner's breach of its warranty of seaworthiness is unlike Soule's breach of his duty, as master, to navigate the vessel with care. The Osceola, 189 U.S. 158 (1903). Consequently, the two common tortfeasors are not "joint tortfeasors". Each is only liable for his share of the wrong. Compare, Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282 (1952), with Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956). See also, Waterman Co. v. Dugan and McNamara Inc., 364 U.S. 421 (1960). The federal rule has been severely criticized. Gilmore and Black, "The Law Of Admiralty" (1957), pp. 366-374. (The nature of the liability of the two common tortfeasors, the master and the shipowner, that is, whether under these circumstances their liability for the loss is joint or several, is of course a matter to be decided under the law of Hawaii. The Tungus v. Skovgaard, 358 U.S. 588, 71 ALR2d 1280 (1959). Counsel has not discovered a decision of the Hawaii Supreme Court directly in point. Nevertheless, it is inconceivable that Hawaii, with its contribution among tortfeasors statute, would adopt the unsatisfactory "all or nothing" federal approach.)

The history of the United States is a story of growth and change. From the first European settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and the establishment of colonies. The American Revolution led to the birth of a new nation, and the subsequent years saw the expansion of territory and the growth of industry. The Civil War was a pivotal moment in the nation's history, leading to the abolition of slavery and the strengthening of the federal government. The late 19th and early 20th centuries were characterized by rapid industrialization and the rise of big business. The Great Depression of the 1930s led to significant government intervention in the economy. The mid-20th century saw the United States emerge as a global superpower, leading the world in the Cold War. The latter part of the 20th century was marked by social and cultural changes, including the civil rights movement and the Vietnam War. The 21st century has seen the United States continue to play a leading role in the world, facing new challenges such as globalization and climate change.



Since the liability of the two common tortfeasors, the master and the shipowner, is several because the duties each owed Toyofuku were entirely dissimilar, the loss must be apportioned in accordance with their relative degrees of fault. See, 1 Harper and James, "The Law Of Torts" (1956), pp. 701-709. Consequently, if Kahului Railroad Company, the shipowner, is not a party to the action in the state court, Soule may be held liable for the entire loss. Soule's defense in the state courts will be prejudiced if Kahului Railroad Company is not a party to the action.

Second, even though the liability of the two common tortfeasors, the master and the shipowner, is joint, not several, if the fault charged to each is disproportionate, under Section 246-11, R.L.H., 1955, the relative degrees of fault of each must be determined, and each is separately liable for the portion of the loss attributable to his relative degree of fault.

Section 246-11, R.L.H., 1955, provides in part:

"When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares."

Section 246-16, R.L.H., 1955, provides in part:

"The court may render such judgments, one or more in number, as may be

The first part of the book is devoted to a general history of the United States from its discovery by Columbus in 1492 to the present time. It covers the early years of settlement, the struggle for independence, the formation of the Constitution, and the growth of the nation to its present position. The second part of the book is devoted to a detailed history of the United States from 1789 to the present time. It covers the early years of the Republic, the struggle for the abolition of slavery, the Civil War, and the Reconstruction period. The third part of the book is devoted to a detailed history of the United States from 1865 to the present time. It covers the Reconstruction period, the Gilded Age, the Progressive Era, and the modern history of the United States.

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suitable under the provisions  
of this part"

The Supreme Court of Arkansas has rejected the proposition that, under this uniform contribution statute, each of several tort-feasors is responsible for the entire loss when the fault has been disproportionate.

"Appellant, who seems to apprehend that two of the judgments are not collectible, may have been apportioned out of most of the recovery to which he is entitled. However, we have not the right to place a construction on the Act at material variance from its purpose. The intent was to permit finders of facts to decide relative responsibility of each tort-feasor and to hold him responsible in that proportion only." Little v. Miles, 213 Ark. 725, 212 SW2d 935 (1948).

(Arkansas, South Dakota and Hawaii are the three states with the entire 1939 Uniform Contribution Among Tort-Feasors Act. The Commissioners have since proposed a different uniform act. Handbook Of The National Conference Of Commissioners On Uniform State Laws (1955), p. 216.) Little has been cited recently with

PHILOSOPHY DEPARTMENT  
1100 EAST 58TH STREET  
CHICAGO, ILLINOIS 60637  
TEL: (773) 936-3300  
WWW.PHIL.DEP.UCHICAGO.EDU

PHILOSOPHY DEPARTMENT  
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TEL: (773) 936-3300  
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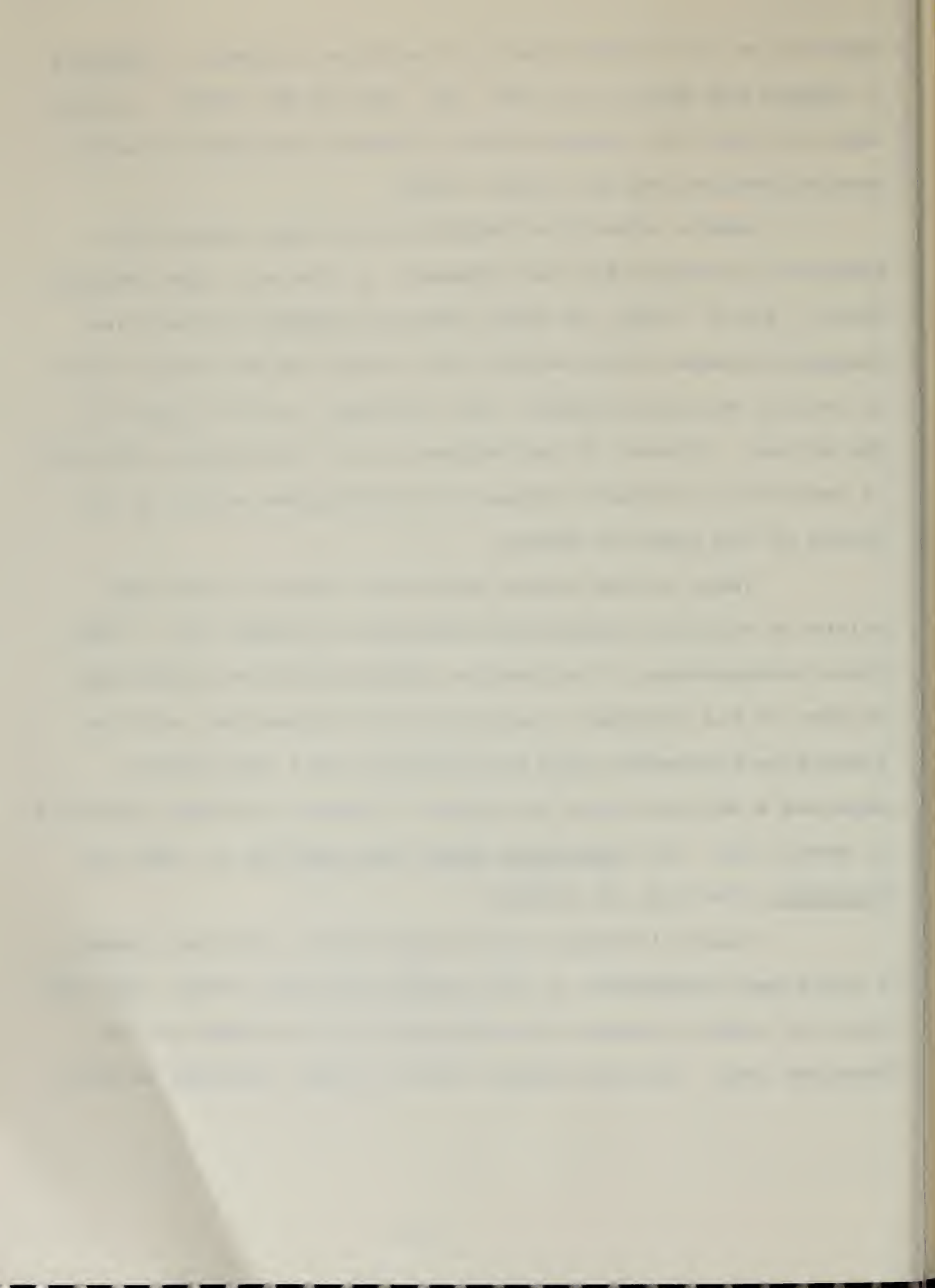
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approval by the Supreme Court of the State of Hawaii. Mitchell v. Branch and Hardy, 45 H 128, 142, 363 P2d 969 (1961). Little marks the path the Supreme Court of Hawaii has taken in interpreting Section 246-11, R.L.H., 1955.

Again, since the liability of the two common tortfeasors, the master and the shipowner is several, under Section 246-11, R.L.H., 1955, if their relative degrees of fault are disproportionate, Soule may be held liable for the entire loss if Kahului Railroad Company, the shipowner, is not a party to the action. Joinder of the shipowner as a third party defendant is essential to Soule's defense of the Toyofuku action in the courts of the State of Hawaii.

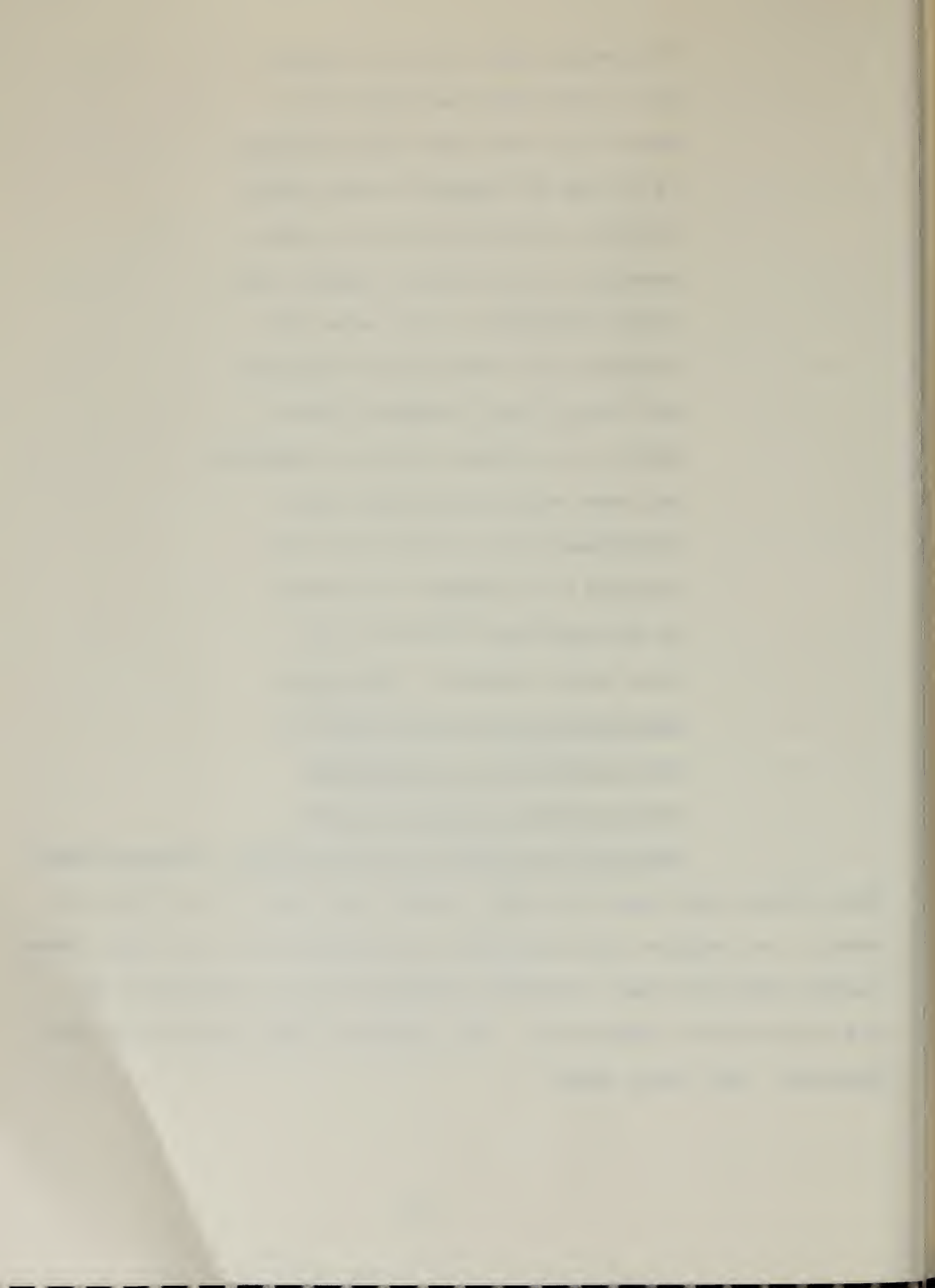
(Many of the issues before the Court in this case relate to difficult unresolved questions of Hawaii law. Under these circumstances, the District Judge should have abstained. Joinder of the shipowner should have been permitted, and the limitation proceeding held by admiralty until the parties obtained a decision from the courts of Hawaii on these questions of Hawaii law. Cf. Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).)

Third, if Soule cannot make Kahului Railroad Company a third party defendant to the pending Toyofuku action, she may lose her right to compel the shipowner to contribute to the Toyofuku loss. Section 246-16, R.L.H., 1955, provides in part:



"A pleader may either (a) state as a cross-claim against a co-party any claim that the co-party is or may be liable to the cross-claimant for all part of a claim asserted in the action against the cross-claimant; or (b) move for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tortfeasors one of whom has discharged the judgment by payment or has paid more than his pro rata share thereof. If relief can be obtained as provided in this paragraph no independent action shall be maintained to enforce the claim for contribution." (Emphasis Added)

Thus, Soule may lose her right, under the laws of the State of Hawaii, to require the shipowner to contribute to the loss, even though admiralty may ultimately decide that the shipowner is not entitled to limitation. The District Judge discounted this problem. The Court said:





"... [I]f a judgment is obtained against the moving claimant in the state court action, she can obtain contribution from petitioner, if she is entitled to such contribution, in this Court as a Court of Admiralty if its petition is granted." (Rec. pp. 58-59).

The District Judge erred, for admiralty does not recognize a right of contribution among tortfeasors. Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282 (1952).

The State of Hawaii has made available to defendants sued in the courts of the State of Hawaii the procedural right to join other persons, who may be liable to plaintiffs, as third party defendants to the action. This procedural right is important to Soule in the defense of the Toyofuku claims against her. The State of Hawaii has a real interest in affording Soule every opportunity to defend herself in the courts of the State of Hawaii. The problem is of particular concern to the state, for the subject of the suit is a matter regulated by the laws of the State of Hawaii.

The Toyofuku action against Soule is based on Toyofuku's wrongful death within the territorial waters of the State of Hawaii. There is no federal cause of action for death upon the territorial waters of a state. The right to recover for death upon the territorial waters of the State of Hawaii is entirely

The first part of the report is devoted to a general description of the project and its objectives. It is followed by a detailed account of the work done during the year, including a description of the methods used and the results obtained. The report concludes with a summary of the findings and a list of references.

The project was carried out under the supervision of the Director of the Institute. It was supported by the Government of India and the Ministry of Education. The results of the project are being used for the purpose of the research programme of the Institute.

The project was completed on the 31st day of December, 1955. The report is being submitted to the Director of the Institute for his consideration. It is hoped that the results of the project will be of use to the research community.

The author wishes to express his appreciation to the Director of the Institute for his kind attention and to the Ministry of Education for their generous support. He also wishes to thank the following persons for their kind assistance during the course of the project:

Mr. A. B. C. D. E. F. G. H. I. J. K. L. M. N. O. P. Q. R. S. T. U. V. W. X. Y. Z.

The author is a member of the Indian Institute of Technology, Bombay. He is also a member of the Indian Society for the Study of the History of Science and Technology.

The report is being published in the Journal of the Indian Society for the Study of the History of Science and Technology. The volume number is 12 and the page number is 123.

The author's address is: Indian Institute of Technology, Bombay, India.

The author's telephone number is: 123456789.

The author's e-mail address is: abcdefghijklmnopqrstu@iitb.ac.in.

The author's fax number is: 9876543210.

The author's mobile phone number is: 9876543210987654.

The author's home address is: 1234567890, Mumbai, India.

The author's home telephone number is: 1234567890.

The author's home e-mail address is: abcdefghijklmnopqrstu@home.com.

The author's home fax number is: 9876543210.

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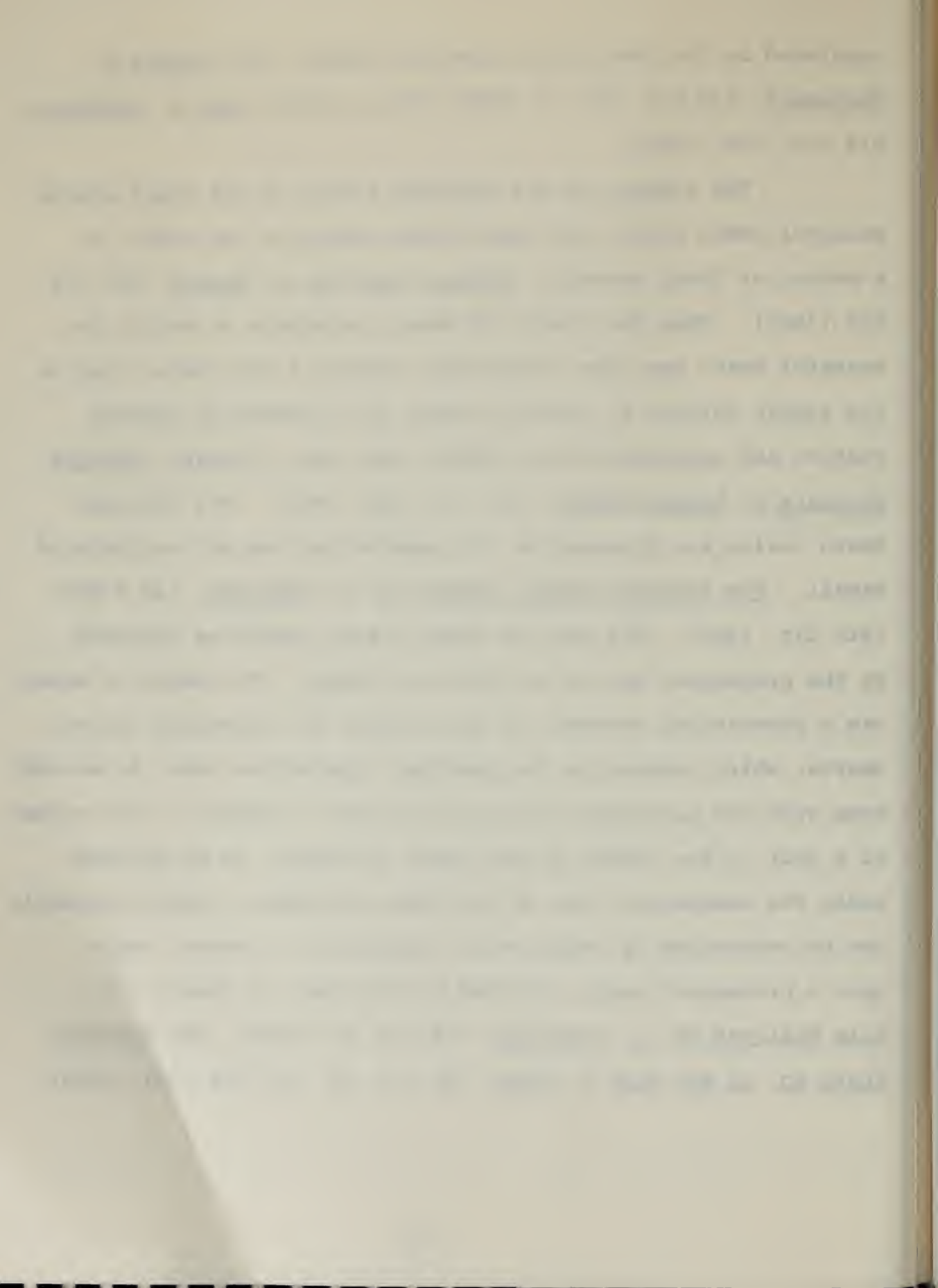
The author's home e-mail address is: abcdefghijklmnopqrstu@home.com.

The author's home fax number is: 9876543210.

The author's home mobile phone number is: 9876543210987654.

regulated by the laws of the State of Hawaii. The Tungus v. Skovgaard, 358 U.S. 588, 71 ALR2d 1280, (1959); Just v. Chambers, 312 U.S. 383 (1941).

The subject of the Toyofuku action in the state courts, wrongful death within the territorial waters of the state, is a matter of local concern. Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). When the courts of Hawaii entertain an action for wrongful death upon the territorial waters of the state, they do not simply enforce a "federal common law" created by federal statute and supplemented by federal case law. Compare, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). The Toyofuku death claims are governed by the substantive law of the State of Hawaii. The Schooner Robert Lewers Co. v. Kekauoha, 114 F 849 (9th Cir. 1902). The suit on these claims should be governed by the procedural law of the State of Hawaii. The State of Hawaii has a substantial interest in the conduct of litigation in its courts, which relates to its peculiar substantive laws, in accordance with the procedural laws of the State of Hawaii. The outcome of a suit in the courts of the State of Hawaii, to be decided under the substantive law of the State of Hawaii, should certainly not be determined by restrictions imposed by a federal court upon a procedural right provided by the State of Hawaii. Cf. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), and Guaranty Trust Co. of New York v. York, 326 U.S. 99, 160 ALR 1231 (1945).

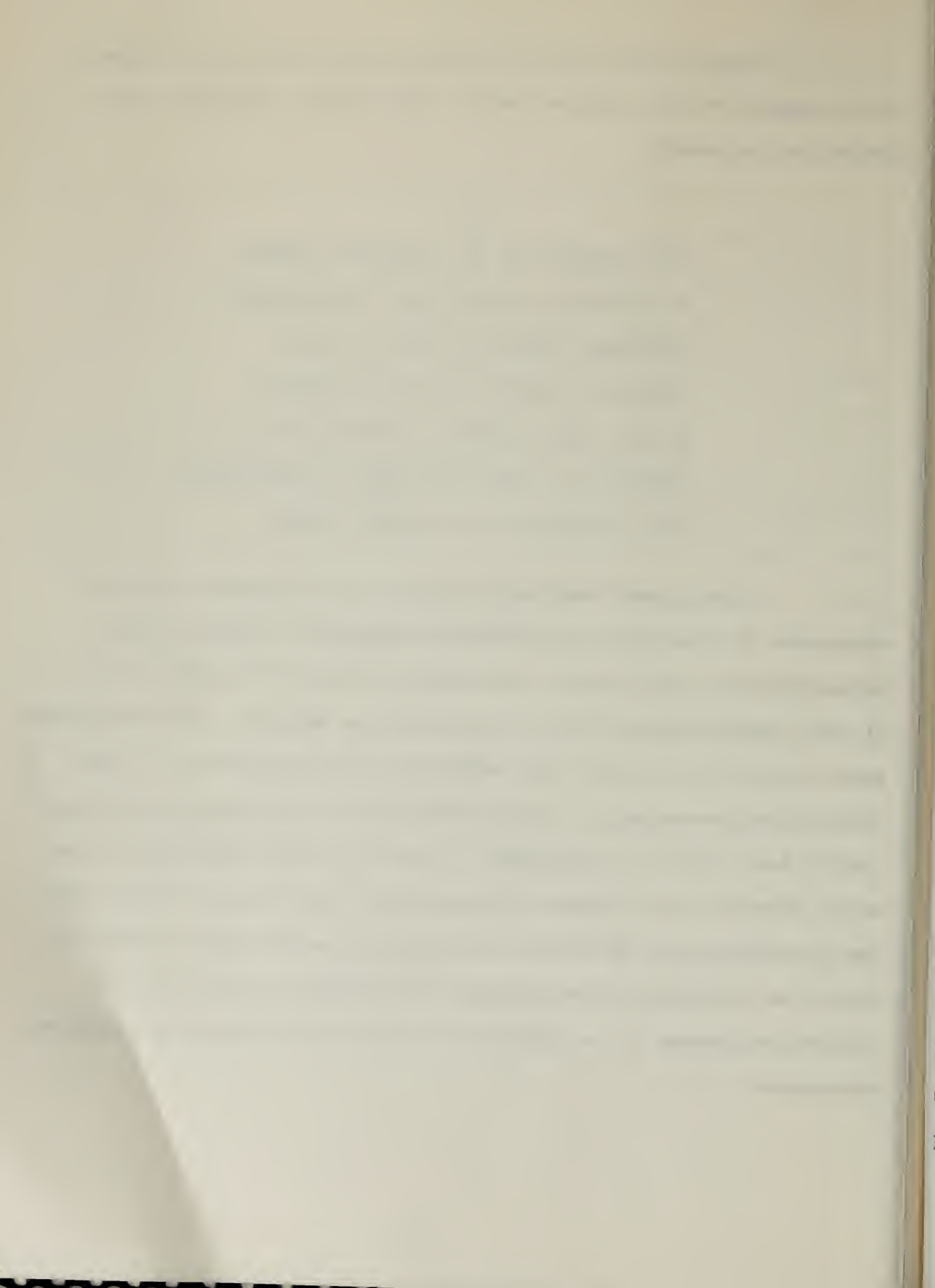


These, then, are the interests of the State of Hawaii with respect to the problem before this Court. What are the competing interests?

### III.

THE INTEREST OF THE STATE OF HAWAII  
IN AFFORDING SOULE EVERY OPPORTUNITY  
AVAILABLE UNDER THE LAWS OF THE  
STATE OF HAWAII TO DEFEND HERSELF  
IN THE STATE COURTS OUTWEIGHS THE  
INTEREST OF THE SHIPOWNER IN CONFINING  
THE LITIGATION TO A SINGLE FORUM.

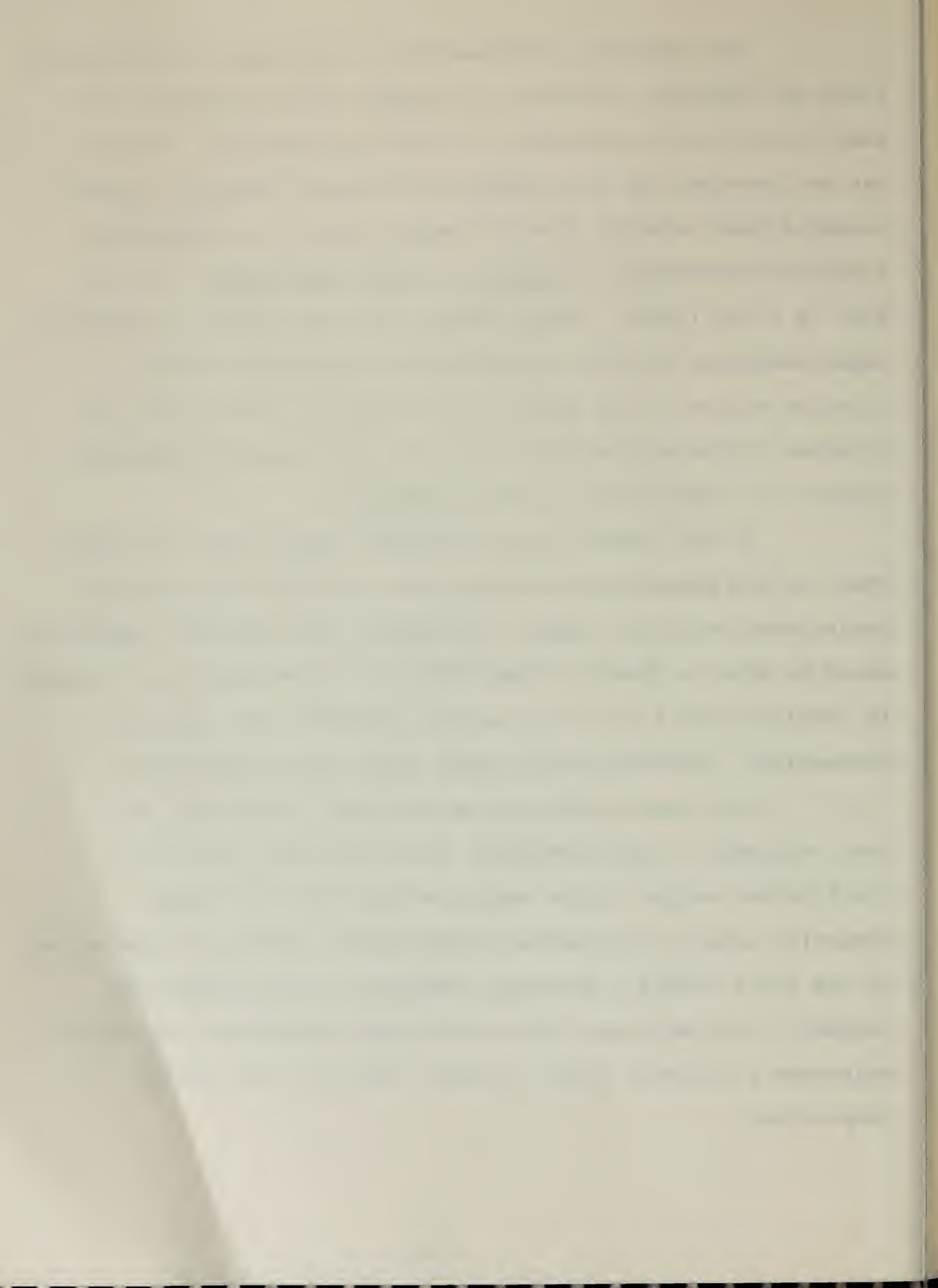
"Concursus" has been the principal argument of the shipowner to justify the prohibition against joinder of the shipowner as a third party defendant in the state suit. All of the claims arising out of the maritime casualty, the shipowner says, should be brought into admiralty and disposed of in the limitation proceeding. Gilmore and Black, The Law of Admiralty (1957) Sec. 10-17, pp. 688-689. Rule 51 of the Admiralty Rules, which permits the issuance of admiralty injunctions prohibiting the prosecution of suits against shipowners who seek limitation should be liberally interpreted, the argument runs, for the injunction issued in an admiralty limitation proceeding promotes concursus.



But concursus is impossible in this case. Soule cannot force the Toyofuku claimants to transfer their claims from the state courts to the admiralty limitation proceeding. Congress has not provided for the removal of an action based on a state wrongful death statute from the state courts to an admiralty limitation proceeding. Grundel v. Union Iron Works, 127 Cal. 438, 59 P 826 (1900). Soule cannot obtain an order in admiralty, under Admiralty Rule 51, enjoining the prosecution of the Toyofuku action in the courts of the State of Hawaii, for the Toyofuku claims against Soule are not, as required by Rule 51, subject to "limitation in the proceeding".

If the removal of the Toyofuku claims from the state court to the admiralty proceeding were possible, the problem Soule faces would not exist. If removal were possible, admiralty would be able to finally adjudicate all of the issues with respect to liability and all of the various claims in the limitation proceeding. Concursus would exist under these conditions.

But these conditions do not exist, and there is no real concursus. Since admiralty lacks the power to control the Toyofuku action in the courts of the State of Hawaii, admiralty should not interfere with Soule's defense of the action in the state courts. Moreover, admiralty should permit the joinder of the shipowner as a third party defendant, since the shipowner's ultimate right to limit liability will not be jeopardized.





The shipowner has also argued that it will be subjected to multiple suits if it is forced into the Toyofuku action as a third party defendant. But the limitation statute was not designed to protect shipowners against multiple suits. The United States Supreme Court said in Lake Tankers Corp. v. Henn, 354 U.S. 147, 153 (1957):

"The state proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court and the provisions of the Act, therefore, do not control. It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus, or railroad company. None of them can force a damage claimant to trial without a jury. They, too, must suffer a multiplicity of suits."

Moreover, Kahului Railroad Company is a Hawaii corporation whose principal activities are confined to the port of Kahului on the island of Maui. There might be some federal interest in prohibiting the joinder of a foreign corporation, with multi-state operations, to a wrongful death action pending in the courts of the State of Hawaii. But this consideration does not



exist in this case. The Second Circuit Court of the State of Hawaii is not an inhospitable forum for the Kahului Railroad Company.

What, then, are the competing interests which are in the balance?

The State of Hawaii has a real and substantial interest in affording litigants in its courts an opportunity to defend themselves by impleader (third party practice), under the existing procedural law of the State of Hawaii. This interest is acute when the subject of the action is a matter, wrongful death upon the territorial waters of the state, governed by the substantive law of the State of Hawaii. On the other hand, the shipowner is interested in limiting the litigation arising out of the casualty to a single forum, that is, the limitation proceeding in admiralty.

The interest of the State of Hawaii in affording Soule every opportunity available under the laws of the State of Hawaii to defend herself against the Toyofuku action certainly outweighs the narrow interest of the shipowner in confining the litigation to a single forum.



## CONCLUSION

The pendency of the limitation proceeding does not preclude joinder of Kahului Railroad Company, the shipowner, as a third party defendant to the wrongful death action brought by the Toyofuku claimants against Soule in the courts of the State of Hawaii.

The "Saving To Suitors Clause" and the "Limitation Act" are in conflict. This conflict over a local maritime matter must be determined by balancing the competing interests.

Soule has a right, under the procedural laws of the State of Hawaii, to implead the shipowner. The exercise of this procedural right may well determine the outcome of the case in the state court. Joinder of the shipowner is essential to Soule's defense.

The action in the state courts, which arises out of a wrongful death upon the territorial waters of the state, is governed by the substantive law of the State of Hawaii. The action relates to a maritime matter of local significance.

The interest of the State of Hawaii in affording Soule every opportunity available under the laws of the State of Hawaii to defend herself outweighs the narrow interest of the shipowner in confining the litigation arising out of the casualty to a single forum. The order of the District Court, from which this appeal has been taken, should be reversed.



Dated at Wailuku, Maui, Hawaii, this 24<sup>th</sup> day of

December, 1963.

Respectfully submitted,

William F. Lovelace

CROCKETT and LANGA  
38 S. Market Street  
Wailuku, Maui, Hawaii

Proctors for Appellant  
Cecilia E. Soule, Executrix of the  
Estate of Walter N. Soule, Deceased.

I CERTIFY THAT, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William F. Lovelace

